Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-84

SECURITY MUTUAL CASUALTY COMPANY, *Petitioner*

v.

CENTURY CASUALTY COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Security Mutual Casualty Company, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled cause on March 12, 1976. A Petition for rehearing before the Honorable David T. Lewis, Chief Judge, the Honorable Delmas C. Hill, and the Honorable James E. Barrett, Circuit Judges of the United States Court of Appeals for the Tenth Circuit was denied by that Court on April 5, 1976.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit and the denial of the petition for rehearing are contained in Appendix A to this Petition and said opinion is reported in 531 F.2d 974 (10 Cir. 1976).

JURISDICTION OF THIS COURT

The statutory provision conferring jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit by writ of certiorari is contained in 28 U.S.C. § 1254.

QUESTION PRESENTED FOR REVIEW

The United States Court of Appeals—Tenth Circuit, Lewis, Chief Judge, Hill and Barrett, United States Circuit Judges, sitting, determined in their opinion that a Notice provision in the insurance treaty (contract) between the Petitioner and Respondent was a covenant and not a condition precedent so that a breach thereof by the defendant, respondent, did not void the treaty but merely constituted a breach of covenant. The place of the treaty was Chicago, Illinois, and the place where notice was to be given pursuant to the Notice requirement of the treaty was the home office of the plaintiff at Chicago, Illinois. This decision of the United States Court of Appeals—Tenth Circuit is in direct conflict with a decision of the United States Court of Appeals for the Seventh Circuit on the same question. The United States Court of Appeals of the Seventh Circuit deciding the case of *Keehn* v. *Excess Insurance Company of America,* 129 Fed. 503 (7th Cir. 1942), directly held that a failure to give notice to the reinsuror of the accident in compliance with the

provision of the contract was a condition precedent and a bar to recovery by the plaintiff, and further that although the contract failed to designate this notice provision as a condition precedent and did not contain a declaration of forfeiture for non-compliance constituted a condition precedent. This issue which is in conflict between the United States Court of Appeals for the Tenth Circuit and the United States Court of Appeals for the Seventh Circuit is of great importance to and will have a significant impact upon the insurance industry in the United States. The opinion of the United States Court of Appeals for the Seventh Circuit in the *Keehn* case, *supra,* is contained in Appendix B to this Petition.

A further question presented for review is that the United States Court of Appeals for the Tenth Circuit has rendered a decision in conflict with the applicable law of the State of Colorado.

STATEMENT OF THE CASE

Security Mutual Casualty Company, the Petitioner, brought an action seeking a declaratory judgment determining its rights and liabilities under a reinsurance treaty with Century Casualty Company, the Respondent. Security Mutual also sought to recover damages incurred as a result of a judgment against Century's insured, Anderson Aviation Sales Company, Inc.

Security Mutual claimed it had no liability as reinsuror because Century Casualty failed to give timely notice of the fatalities and resulting claims involved in the Anderson Aviation litigation. Trial court held that, under the reinsurance treaty, notice was a condition precedent to Security Mutual's liability to indemnify Century Casualty. The Court found as a matter

of fact that notice was not given and entered judgment for Security Mutual.

The two companies entered into the reinsurance treaty in March 1966. Security Mutual agreed to reinsure a specified portion of Century Casualty's losses under its primary insurance contracts in return for a portion of the premiums. During 1969, Century Casualty insured Anderson Aviation, an Arizona corporation, in the business of leasing airplanes to the public. The policy was within the scope of the reinsurance treaty. On September 3, 1969, an Anderson Aviation plane crashed in Blythe, California, killing the pilot and five (5) passengers and destroying the plane. Suit was brought in State Court of Arizona, on behalf of the passengers against the passengers' employer, the pilot, and Anderson Aviation. Anderson Aviation was held liable under theory of negligent entrustment. The judgment, in the amount of Three Hundred Eighty-five Thousand Dollars ($385,000.00) plus costs and interest, was affirmed on Appeal. *Anderson Aviation Sales Company, Inc.* v. *Perez,* 508 P.2d 87 (Arizona Appeals 1973).

Century Casualty received notice of the death claims and the claims for hull damage to the airplane shortly after September 8, 1969. Century paid the claim for damage to the airplane and submitted a reinsurance claim on December 1, 1969, for the hull damage. Security Mutual without notice of the fatalities paid the reinsurance claim two (2) weeks later. Suit was filed on the death claims on September 12, 1970, but the trial Court found Security Mutual received no notice of the deaths or the lawsuits until April 27, 1971, after the verdict had been returned against Century's insured and the post-trial motions had been denied. Century Casualty provided the defense in the Arizona trial Court but requested Security Mutual's assistance in the Appeal. Security posted Three Hundred Eight Thousand Dollars ($308,000.00) and Anderson Aviation posted Eighty-two Thousand Dollars ($82,000.00) on the supersedeas bond. Security Mutual and Century Casualty cooperated in the unsuccessful Appeal.

Security in the lower Court sought to establish that it was not liable under the reinsurance treaty for any part of the Arizona judgment against Century Casualty's insured. It also sought to recover its expenses in prosecuting the Appeal from that judgment. The trial Court determined as a matter of fact that notice was not given as required by the treaty and determined as a matter of law that the notice provision of the treaty was a condition precedent which was breached by Century. The sole question on Appeal to the United States Court of Appeals—Tenth Circuit was whether the notice of the deaths and subsequent claims is a condition precedent to Security Mutual's liability under the reinsurance treaty.

United States Court of Appeals—Tenth Circuit in their opinion decided that the notice provision of the treaty is a covenant by Century and not a condition precedent to Security's duty to make payment.

The *Keehn* case, *supra,* was presented to the Court with no opposing cases cited by counsel for the respondent. Several Colorado cases were cited by the petitioner in support of the law in Colorado, which petitioner feels is the same as the law of Illinois. No cases were cited contra by the respondent. The United States Court of Appeals for the Tenth Circuit stated that the law of Illinois did not apply, therefore the *Keehn* case did not apply, and that the law of Colorado

was contra to the law of Illinois as set forth in the *Keehn* case.

Petitioner asks that this Court review the questions presented, determine that the law of Illinois applies pursuant to the opinion of the United States Court of Appeals for the Seventh Circuit in the *Keehn* case, *supra,* and that such law is also the law of Colorado, that a notice provision as found in the treaty between the parties in this case is a condition precedent to liability under the contract, thereby resolving the conflict between the decision of the United States Court of Appeals for the Tenth Circuit and the decision of the United States Court of Appeals for the Seventh Circuit and the law of the State of Colorado.

ARGUMENT

The law applicable to the construction of the contract with respect to the notice provision in the contract is the law of Illinois. Since the place of the contract is Chicago, Illinois, and of necessity the place where notice would be given pursuant to the notice requirement would be the home office of the plaintiff at Chicago, Illinois, the case of *Keehn* v. *Excess Insurance Company of America, supra,* would apply in this case. The opinion in the *Keehn* case, *supra,* states in this regard as follows:

> "the Court below held that the failure to give notice to the defendant of the snow accident, in compliance with this provision of the contract was such as to bar recovery by the plaintiff. In doing so, it held contrary to plaintiff's contention that the provision was not controlling for the reason that the contract failed to designate this provision as a condition precedent, nor did it contain a declaration of forfeiture for non-compliance."

The law in Colorado is not different from the law in Illinois. There are no reinsurance cases in Colorado, and although the cases cited in Colorado refer to primary insurance where the notice provision is found under the general heading of "Conditions", it does not follow that a provision in a reinsurance treaty requiring notice of claims must be construed as a promise rather than a condition precedent. Similar primary insurance cases where the notice requirement is set forth under the word "Condition" are also found in the Illinois Courts. As an example see the case of *Simmon* v. *Iowa Mutual Casualty Company,* 111 N.E.2d 376.

Provisions in insurance policies and reinsurance treaties that require notice of death, injury to loss be given within a specified time after the happening thereof, are held to be "conditions precedent". 13 *Couch on Insurance* 2d § 49:19 and cases cited in Note 17 thereof. The notice requirements in the reinsurance treaty in this case require that the notice be given "immediately" and "prompt".

An express provision for notice is to be construed under the law of the State where the contract was made. This contract was made in Illinois and Illinois therefore applies. 13 *Couch on Insurance* 2d § 49:21. The *Keehn* case, *supra,* is controlling.

In addition to the preceeding argument, petitioner contended that the notice provision was expressly made a condition precedent by the following clauses in page 1 of the reinsurance treaty:

> "WITNESSETH: That in consideration of the mutual covenants hereinafter contained and upon the terms and conditions hereinbelow set forth, the

parties hereto agree as follows: Article I—Policies Covered: the reinsuror hereby agrees to indemnify the company in respect to the net excess liability which may accrue to the company under its policies * * * "

"subject to the terms, conditions, and limitations of this agreement and of the exhibits * * * "

Similar clauses were considered sufficient to create an express condition precedent in the Colorado case of *Barkley, et al.* v. *London Guaranty Accident Company, Ltd.*, 46 Colo. 558, 105 P.2d 865. The *Barkley* case, *supra,* is similar to the *Simmon* case, *supra,* indicating that the law of Colorado is the same as the law of Illinois. There are no cases contrary cited by the respondent nor are there any cases in Colorado which are contrary to the law of Illinois. Colorado and Illinois law are similar in the insurance field and the other areas of the law (example the long arm statute which Colorado adopted from the Illinois long arm statute). The *Keehn* case, *supra,* is still current law and totally applicable to the facts of this case.

The decision in this case is extremely significant to the insurance industry of the United States in that the treaty which is the subject matter of this case is similar to treaties between primary and reinsurance companies across the country. It is an important element of the relationship between reinsuror and primary carrier that notice of fatalities and claims be made pursuant to the notice treaty so that proper reserves can be set up thereby affecting the financial condition of the company and its ability to write insurance, the right to employ counsel of the reinsurer's choice to assist in the defense of the action to negotiate a settlement, the right to charge premiums concomitant with

the risk involved based upon the loss experience of the primary carrier and the right to prevent fraud and injustice. It is a question which transcends state lines and affects greatly a major industry of the United States.

Respectfully submitted,

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APPENDIX

APPENDIX A

[Argued August 20, 1975; Decided March 12, 1976;
Rehearing Denied April 5, 1976]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1809

SECURITY MUTUAL CASUALTY COMPANY, *Plaintiff-Appellee,*

v.

CENTURY CASUALTY COMPANY, *Defendant-Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D. C. No. C-4311)

Michael F. Scott, Denver, Colorado (Roger D. Bush and James H. Mosley, Denver, Colorado, on the brief), for defendant-appellant.

A. Denison Weaver (John E. Clough, Denver, Colorado, on the brief), for plaintiff-appellee.

Before LEWIS, Chief Judge, and HILL and BARRETT, Circuit Judges.

HILL, Circuit Judge.

Security Mutual Casualty Company, the appellee, brought this action seeking a declaratory judgment determining its rights and liabilities under a reinsurance treaty with Century Casualty Company, the appellant. Security Mutual also sought to recover damages incurred as a result of a judgment against Century's insured, Anderson Aviation Sales Company, Inc.

Security Mutual claimed it had no liability as reinsurer because Century Casualty failed to give timely notice of the fatalities and resulting claims involved in the Anderson Aviation litigation. The trial court held that, under

the reinsurance treaty, notice was a condition precedent to Security Mutual's liability to indemnify Century Casualty. The court found as a matter of fact that notice was not given and entered judgment for Security Mutual.

The two companies entered into the reinsurance treaty in March, 1966. Security Mutual agreed to reinsure a specified portion of Century Casualty's losses under its primary insurance contracts in return for a portion of the premiums. During 1969, Century Casualty insured Anderson Aviation, an Arizona corporation in the business of leasing airplanes to the public. The policy was within the scope of the reinsurance treaty. On September 3, 1969, an Anderson Aviation plane crashed in Blythe, California, killing the pilot and five passengers and destroying the plane. Suit was brought in the state court of Arizona on behalf of the passengers against the passengers' employer, the pilot, and Anderson Aviation. Anderson Aviation was held liable on the theory of negligent entrustment. The judgment, in the amount of $385,000 plus costs and interests, was affirmed on appeal. *Anderson Aviation Sales Co., Inc.* v. *Perez,* 19 Ariz.App. 422, 508 P.2d 87 (1973).

Century Casualty received notice of the death claims and the claims for hull damage to the airplane shortly after September 8, 1969. Century paid the claim for damage to the airplane and submitted a reinsurance claim on December 1, 1969. Security Mutual paid the reinsurance claim two weeks later. Suit was filed on the death claims on September 12, 1970, but the trial court found Security Mutual received no notice of the deaths or lawsuits until April 27, 1971, after the verdict had been returned against Century's insured and the post-trial motions had been denied. Century Casualty provided the defense in the Arizona trial court, but requested Security Mutual's assistance in the appeal. Security posted $308,000 and Anderson Aviation posted $82,000 on the supercedeas bond.

Security Mutual and Century Casualty cooperated in the unsuccessful appeal.

In the present action Security Mutual seeks to establish that it is not liable under the reinsurance treaty for any part of the Arizona judgment against Century Casualty's insured. It also seeks to recover its expenses in prosecuting the appeal from that judgment. The trial court in this case determined, as a matter of fact, that notice was not given as required by the treaty. The sole question on appeal is whether notice of the deaths and subsequent claims is a condition precedent to Security Mutual's liability under the reinsurance treaty. If it is, the judgment must be affirmed. We conclude it is not and therefore reverse the judgment.

We have been cited to only one case deciding whether notice from the primary insurer to its reinsurer is a condition precedent to the reinsurer's liability. In *Keehn* v. *Excess Insurance of America,* 129 F.2d 503 (7th Cir. 1942), the court held notice of loss was a condition precedent under the terms of the contract there in dispute. *Keehn* was decided under Illinois law, and we do not believe Colorado law compels the same result. Moreover, every contract must be interpreted according to its own terms.

The Colorado cases cited by appellant involve primary insurance rather than reinsurance. In Colorado, notice of loss may be expressly made a condition precedent to an insurer's liability. *Barclay* v. *London Guaranty & Accident Co.,* 46 Colo. 558, 105 P. 865 (1909); *see Dairyland Insurance Co.* v. *Cunningham,* 360 F. Supp. 139 (D. Colo. 1973). However, a provision for notice will not be construed as a condition precedent unless that intention is clearly and unequivocally stated in the contract. *Connecticut Fire Insurance Co.* v. *Colorado Leasing Mining & Milling Co.,* 50 Colo. 424, 116 P. 154 (1911); *Preferred Accident Insurance Co.* v. *Fielding,* 35 Colo. 19, 83 P. 1013 (1905). The same rule is stated in 13 Couch on Insurance 2d § 49:20 as

follows: "[S]tipulations for notice will not be construed as conditions precedent if reasonably open to another construction."

Before we may apply these rules of construction, however, we must attempt to determine the intent of the parties by interpreting the language of the contract. A court will not force an ambiguity in order to resolve it against an insurer. *Massachusetts Mutual Life Insurance Co.* v. *DeSalvo,* 482 P.2d 380 (Colo. 1971); *Southern Surety Co.* v. *MacMillan Co.,* 58 F.2d 541 (10th Cir. 1932), *cert. denied,* 287 U.S. 617, 53 S.Ct. 18, 77 L.Ed. 536. The notice provision of the Security Mutual-Century Casualty reinsurance treaty states:

> The Company [Century] shall immediately give notice to the Reinsurer [Security] on all claims reserved in excess of the Company' [sic] retention and also shall give prompt notice to the Reinsurer on claims which, in the judgment of the Company could develop into losses involving reinsurance hereunder. Further, as respects bodily injuries, the Company shall report to the Reinsurer all claims involving fatalities, . . . regardless of liability, where the policy limits (or Workmen's Compensation Benefits) applicable to such losses exceed the retention of the Company . . . .

We do not believe this language plainly states a condition precedent. It is significant, in a contract as carefully drawn as an insurance contract, that none of the usual words indicating a condition precedent are present. *See Southern Surety Co.* v. *MacMillan Co., supra.* Perhaps more significant is the inclusion of language expressly designating compliance with another contract clause a condition precedent. The arbitration clause states, "[A]s a condition precedent to any right of action hereunder, the parties to this agreement shall submit the matter in dispute to arbitration." Certainly the omission of similar

language from the notice clause is some indication it was not considered a condition precedent.

Security Mutual argues that the notice provision is expressly made a condition precedent by the following clauses in page one of the reinsurance treaty:

> *Witnesseth:*
>
> That in consideration of the mutual covenants hereinafter contained and upon the terms and conditions hereinbelow set forth, the parties hereto agree as follows:
>
> ARTICLE I
>
> POLICIES COVERED:
>
> The Reinsurer hereby agrees to indemnify the Company in respect to the net excess liability which may accrue to the Company under its policies . . . .
>
> . . . .
>
> subject to the terms, conditions and limitations of this Agreement and of the Exhibits . . . .

Security points out that a similar clause was considered sufficient to create an express condition precedent in *Barclay* v. *London Guarantee & Accident Co., supra.* We agree that a catch-all conditioning clause at the beginning of a contract may be sufficient when all the clauses following are true conditions. In an ordinary insurance contract, like that in *Barclay,* this may often be the case. A primary insurance contract is essentially unilateral in nature. The entire relationship is based upon a promise and a condition. The insurer promises to pay a sum of money upon the happening of an uncertain and fortuitous event, conditioned upon the payment of premiums by the insured. The insured makes no return promise to pay the premiums and the other duties placed on the insured are usually stated as conditions rather than promises. 3A Corbin on Con-

tracts § 731 (1960). We believe this explains the court's holding in *Barclay*.

In contrast, a reinsurance treaty is a contract for insurance, not a contract or policy of insurance. 19 Couch on Insurance 2d § 80:2 (1965). In a reinsurance treaty, the reinsured contracts to cede all or part of its risks to the reinsurer. The reinsurer contracts to accept the risks in return for a portion of the premiums. 13 Appleman, Insurance Law and Practice § 7681 (1945). A treaty is a bilateral contract containing mutual covenants. The Security Mutual-Century Casualty treaty contains provisions, such as those pertaining to loss reserves and taxes and to commencement and termination of the contract, which appear to be covenants rather than conditions. We cannot say that a clause stating the agreement is made "upon the terms and conditions hereinbelow set forth" makes every provision in the succeeding 12 pages of the contract a plain and unequivocal condition precedent, especially when the clause also refers to "mutual covenants hereinafter contained."

In this regard, our case is closely akin to *Southern Surety Co.* v. *MacMillan Co., supra,* where the court found the word "provided," which usually indicates a condition precedent, had been indiscriminately used to introduce some paragraphs that might be conditions and others that might be covenants. The court held that the use of condition precedent language did not remove the ambiguity and resorted to the rules of construction to enforce the contract. We are likewise unable to determine the intent of the parties by interpreting the language of the contract and must apply the rules of construction.

We noted above that Colorado law does not favor construing ambiguous terms as conditions precedent. A construction as covenants rather than conditions is desirable because it avoids forfeitures. *Southern Surety Co.* v. *Mac-*

Millan Co., supra; 13 Couch on Insurance 2d § 49:20 (1965). In addition, it has been held that any ambiguity in a reinsurance contract is to be resolved against the reinsurer unless the language is that of the original insurer. *Justice* v. *Stuyvesant Insurance Co.,* 265 F. Supp. 63 (D. W. Va. 1967). Applying these rules to the contract before us, we hold that the notice provision is a covenant by Century and not a condition precedent to Security's duty to make payment.

We believe our construction of the reinsurance treaty is consistent with the main purpose of the contract. The purpose of notice and proof of loss clauses in primary insurance contracts is to afford the insurer an opportunity to form an intelligent estimate of its liabilities, to afford it an opportunity to investigate the claim while witnesses and facts are available, and to prevent fraud and imposition upon it. 44 Am. Jur. 2d Insurance § 1455 (1969). In reinsurance contracts, like the one before us, the investigation and defense of the claim is usually left to the primary insurer. Although Security was given the right to associate in the defense of claims, when it so desired, such participation was not so essential as it is for a primary insurer. Century had as much reason as Security to see that the death claims in Anderson Aviation litigation were properly investigated and defended. Between the two insurers, there was little danger of fraud or imposition. Had Security shown any pecuniary injury from Century's failure to give them notice, we believe damages would have been an adequate remedy. Our construction of the contract does not deny the reinsurer the protection it needs, and it does give the reinsured the security and returns for which it paid. *See* 1 Couch on Insurance 2d § 15:26 (1965).

Finally, we should emphasize the public policy considerations that support our judgment. The Colorado Commissioner of Insurance is charged with the duty of protecting

the State's insurance-buying public. Colo. Rev. Stat. Ann. § 10-1-108 (1973). Pursuant to this duty, he must assure the solvency of insurers doing business in Colorado. This is accomplished primarily by requiring certain minimum capital reserves. However, Colo. Rev. Stat. Ann. § 10-3-118 (1973) provides that an insurer "may take credit for reserves on risks ceded to a reinsurer." In an *amicus curiae* brief filed in the trial court and incorporated in Century Casualty's brief before this Court, the Commissioner points out that the credit for reinsurance is necessary to keep many small but highly competitive companies in the insurance business. If this credit is to be allowed, the Commissioner must be certain the reinsurance will be available when a claim is made. In this regard, § 10-3-118(e) provides: "No credit shall be allowed for reinsurance where the reinsurance contract does not result in the absolute transfer to the reinsurer of the risk of liability"

For the Commissioner to accurately determine whether the transfer of liability is absolute or conditional, we think the language of the contract must be plain and unequivocal. To allow an insurer to obtain credit for reserves on a reinsurance contract that contains obscure conditions precedent, and then allow the reinsurer to subsequently deny liability, would substantially impair the function of the Commissioner of Insurance. Moreover, it would substantially increase the danger to the public. An apparently solvent insurer might be plunged into insolvency through its reinsurer's reliance on the nonperformance of an ambiguous condition precedent. If we require any condition that might result in forfeiture to be clearly stated, it will enable the Commissioner to accurately determine when a credit against reserves for reinsurance should be given. A different holding in this case would undermine the Commissioner's ability to ascertain the solvency of Colorado insurance companies.

We reverse the judgment insofar as it holds Security Mutual is not liable under the reinsurance treaty for the Anderson Aviation judgment. The amount of its liability should be determined under the terms of the reinsurance treaty. Therefore, the judgment for damages is also reversed. Century Casualty has not appealed from the part of the judgment declaring that Security Mutual is entitled to terminate the reinsurance treaty, and it will be allowed to stand. We remand with directions to enter judgment consistent with this opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 74-1809

SECURITY MUTUAL CASUALTY COMPANY, *Plaintiff-Appellee,*

vs.

CENTURY CASUALTY COMPANY, *Defendant-Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Petition for Rehearing

COMES Now the Plaintiff-Appellee, by its attorneys, White & Steele, P.C., and A. Dennison Weaver, and petition this Court for a rehearing of the issues on appeal in this action for the reasons that the Court has misapprehended the law applicable to the construction of the contract in question and has misapprehended the effect of the Court's ruling on the damage award.

1. The law applicable to the construction of the contract with respect to the notice provision in the contract is the law of Illinois.

a. The place of the contract is Chicago, Illinois, and of necessity, the place where notice would be given pursuant to the notice requirement would be the home office of the plaintiff at Chicago, Illinois. The case of *Keehn* v. *Excess Insurance Company of America,* 129 F.2d 503 (Seventh Circuit, 1942) which this Court agrees held that notice of the loss was a condition precedent under the terms of the contract even where the notice provision did not spell out that it was a condition precedent, would apply in this case. The opinion in the Keehn case, *supra,* states in this regard as follows:

> "The Court below held that the failure to give notice to the defendant of the Snow accident, in compliance with this provision of the contract was such as to bar recovery by the plaintiff. In doing so, it held contrary

> to plaintiff's contention that the provision was not controlling for the reason that the contract failed to designate this provision as a condition precedent, nor did it contain a declaration of forfeiture for noncompliance."

b. The law in Colorado is not different from the law in Illinois. There are no reinsurance cases in Colorado and although the cases cited in Colorado refer to primary insurance where the notice provision is found under the general heading of "Conditions", it does not follow that a provision in a reinsurance treaty requiring notice of claims must be construed as a promise rather than a condition precedent. Similar primary insurance cases wherein the notice requirement is set forth under the word "Condition" are also found in the Illinois courts. As example see the case of *Simmon* v. *Iowa Mutual Casualty Company,* 111 N.E.2d 374, quoted earlier by Plaintiff-Appellee in its brief.

c. All of the other provisions of the insurance treaty do not spell out that they are conditions precedent and certainly it could not be construed that the agreement to indemnify the primary company by the reinsurance insurance company would not be a condition precedent or that the payment of premiums by the primary company would not be a condition precedent or that the provisions for cancellation and the requirements thereunder would not be conditions precedent. Because the words "condition precedent" were not used does not mean that these provisions are not conditions precedent to the effectiveness of the contract.

d. Provisions in insurance policies and reinsurance treaties that require notice of death, injury or loss be given within a specified time after the happening thereof, are held to be "conditions precedent". 13 *Couch on Insurance* 2nd § 49:19 and cases cited in Note 17 thereof. The notice requirements in the reinsurance treaty in this

case require that the notice be given "immediately" and "prompt".

In summary an express provision for notice is to be construed under the law of the state where the contract was made. This contract was made in Illinois and Illinois law therefore applies. 13 *Couch on Insurance* 2nd § 49:21. The Keehn case, *supra.* is controlling.

2. The Court erroneously set aside the award of damages due to the failure of defendant to give notice pursuant to the terms of the notice provision of the contract of insurance.

The Court stated in its opinion that damages would be an adequate remedy for security. If the Court continues to maintain that the notice provision is a covenant and not a condition precedent then Plaintiff-Appellee should have the opportunity to request the lower court to set the damages sustained as the result of Defendant-Appellant's failure to give notice. Such damages would include costs expended as a result of the primary carrier's failure to give notice as well as the increased premiums which would have been prorated if the company had been properly given notification to the claims pursuant to the terms of the contract.

3. The Court misapprehended the effect of the failure of primary carrier of failing or refusing to give notice to the reinsurer.

The premiums to be paid by Century depend upon the claims that are reported by them to the reinsurance company. According to the testimony of the underwriters, the premiums are determined based upon "experience". This Court stated in its opinion that "there was little danger of fraud or imposition between the two insurers. Because the primary carrier does not report claims and hopes that the claim will not reach fruition where any judgment has to be paid out, then their experience determines that a lesser premium will be paid by them to the reinsurance carrier. If all claims are reported as required under the notice provisions of the reinsurance treaty, then the true experience of the primary carrier is shown and the premium is appropriately determined. This amount could be quite substantial and would be in this case. It should have been clear from the record that it was the reinsurer's contention that this was the motivation behind the primary carrier's failure or refusal to give notice of this claim until appeal had been taken.

This Court should amend its opinion to remand this action to the lower court for a rehearing concerning appropriate damages to be awarded to Plaintiff-Appellee as a result of the failure of Defendant-Appellant to give notice pursuant to the notice provisions of the policy if this Court continues to maintain that this notice provision was not a condition precedent but was a convenant under the policy from which damages would flow.

4. This Court's dictum statement that the allowance by the Insurance Commissioner of the State of Colorado that an insurer "may take credit for reserves on risks ceded to a reinsurer" is a basis in public policy for their determination that the notice provisions of the reinsurance treaty were not conditions precedent, has no substance in the facts of this case for the reason that no reserves were ever set by the primary carrier for the claims that were made in this case. In looking at the public policy question the Court should take into consideration the fact that the original plaintiffs in this action have been paid the judgments that were rendered against Anderson Aviation Company by virtue of the supercedeas bond that was put up by the Plaintiff-Appellee. This Court should also take into consideration the fact that insurance companies such as the Defendant-Appellant who engage in the kind of activities that were engaged in in this case should not be allowed to conduct business in the fashion that took place in this case.

Conclusion

The notice provision of an insurance contract such as the one in the insurance contract between the parties gives substantial rights to the reinsurer to among other things, defend, investigate, settle, etc. in an effort to protect the reinsurer from just what happened in this case. Any sums over and above the amount paid by Century on the original hull loss would have to be paid by the reinsurer. The primary carrier, by failing to give notice attempted to prevent an increase in the premiums that would be due to the reinsurer thereby creating an imposition upon the reinsurer. If the notice provision of the policy is merely a convenant from which only nominal damages, if any, are allowed then the condition and requirement of the primary carrier to give notice is hollow and a useless effort and a denial of the rights and property of the Plaintiff-Appellee.

The law of the state where the contract was made, which is Illinois, applies in this case and the Keehn v. Excess Insurance case, *supra.*, is controlling that the notice provision of this reinsurance contract even though it does not use the words "condition precedent" is a condition precedent which was breached by the Defendant-Appellant.

Plaintiff-Appellee petitions this Court for a rehearing of the issues on appeal, particularly the issue of the legal effect of the notice requirement of the insurance contract between the parties.

Respectfully submitted,

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[Certificate Omitted in Printing]

APPENDIX B

CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT

June 17, 1942

No. 7880

KEEHN V. EXCESS INS. CO. OF AMERICA

* * * * * * * * * * *

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division; J. Leroy Adair, Judge.

Suit by Roy D. Keehn, as receiver of Central Mutual Insurance Company of Chicago, against the Excess Insurance Company of America, a corporation, to recover upon a reinsurance contract issued by defendant to Central Mutual Insurance Company, whereby the defendant insured Central Mutual on third party automobile public liability risks above certain amounts assumed by the Central Mutual. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Charles F. Hough, William H. Beckman and George H. Braasch, all of Chicago, Ill. (Ferre C. Watkins, of Chicago, Ill., of counsel), for appellant.

L. Duncan Lloyd, C. H. G. Heinfelden, and Leonard F. Martin, all of Chicago, Ill., for appellee.

Before Major, Kerner, and Minton, Circuit Judges.

Major, Circuit Judge.

This is an appeal from a judgment in favor of the defendant, entered June 4, 1941, in a suit filed by plaintiff's predecessor against the defendant February 26, 1935. The action was predicated upon a reinsurance contract issued by the defendant to the Central Mutual Insurance Company, January 10, 1935, whereby the defendant insured Central Mutual on third party automobile public liability

risks above certain amounts assumed by the latter company. It was sought to recover the excess amount paid by Central Mutual by virtue of its policy issued to Hartliep Transit Company on account of recovery by Barton Snow and his wife for injuries sustained in an accident within the terms of the policy issued by Central Mutual.

The suit by Snow and his wife against Hartliep Transit Company was instituted February 26, 1935, for injuries sustained in an automobile collision which occurred February 12, 1935. This suit was defended by Central Mutual and resulted in a verdict and judgment in favor of the plaintiff. Central Mutual refused to pay the judgment and on October 28, 1935, garnishment proceedings were instituted against it which resulted in a judgment from which an appeal was taken on April 7, 1936, to the Appellate Court of Illinois, Second District. The judgment was affirmed November 30, 1936, and leave to appeal to the Supreme Court of Illinois denied April 6, 1937. Hartliep Transit Co. v. Central Mut. Ins. Co., 288 Ill.App. 140, 5 N.E.2d 879. The judgment was paid by the surety company on the appeal bond furnished by Central Mutual out of funds deposited with it as security for the appeal bond.

The reinsurance contract, upon which plaintiff's cause of action was predicated, contained the following provision:

"Section IX. The Company shall notify the Reinsurer immediately after it has had notice of any accident in which this reinsurance is or may probably be involved. Such notice shall be given to the Reinsurer on Preliminary Loss Advice on forms as per copy attached, and when final settlement is made the Reinsurer shall advise on Final Loss Advice on forms as per copy attached.

"The Reinsurer shall have the right and opportunity to associate with the Company in the defense and control of any claim or suit or proceeding relative to an accident where the claim or suit involves this reinsurance."

The court below held that the failure to give notice to the defendant of the Snow accident, in compliance with this provision of the contract, was such as to bar recovery by the plaintiff. In doing so, it held contrary to plaintiff's contention that the provision was not controlling for the reason that the contract failed to designate this provision as a condition precedent, nor did it contain a declaration of forfeiture for non-compliance.

The actual time as to when defendant received notice of the Snow accident is a matter of controversy here as it was in the court below. Plaintiff contends that the defendant had notice on numerous dates, particularly in the latter part of June or the first part of July, 1935, September 2, 1935, and February 25, 1936. The court below specifically found that defendant received no notice on the various dates claimed by the plaintiff, that notice was first received by the defendant on or about October 5, 1936, and that on October 14, 1936, it wrote Central Mutual that by reason of its delay in giving notice, the defendant declined all liability in the matter. Plaintiff contends that there is no substantial evidence to support the court's finding as to the time of notice. We have read the testimony upon which the plaintiff relies and we do not agree with this contention. We are convinced that the court's findings are amply supported—in fact, there is no competent substantial evidence which would support a finding that notice was given at a date earlier than that found by the court.

So we have a situation where the accident, out of which the liability arose, occurred February 12, 1935, judgment in a suit against Hartliep Transit Company entered October 25, 1935, garnishment proceedings instituted against Central Mutual October 28, 1935, judgment against the latter March 6, 1936, and an appeal to the Appellate Court on April 7, 1936, all prior to the date (October 5, 1936) when defendant received notice from Central Mutual.

Plaintiff cites and discusses authorities from a number of jurisdictions, as well as numerous text books, in support of his contention as to the majority rule in construing a provision in insurance contracts as to notice and proof of loss. In our view, a review of such authorities would serve no good purpose—in fact, it would be wasted energy. What may be the rule in some other jurisdiction, or what rule is supported by the weight of authority, is of little consequence since Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487. We must look for guidance to the Illinois decisions and those only.

Unfortunately for plaintiff, the effect to be given the provision of the contract in dispute has been decided favorably to defendant's contention in Niagara Fire Insurance Co. v. Scammon, 100 Ill. 644, and Scammon v. Germania Insurance Co., 101 Ill. 621. We see no occasion to analyze or discuss these cases for the reason that plaintiff, in his brief, frankly concedes they support the position of the defendant. Nor is it claimed that the rule of those cases has been subsequently overruled or modified by the Supreme Court. It is sought to dissipate their effect by reference to what is claimed to be the majority rule and by general statements appearing in certain decisions of the Appellate Courts of Illinois, apparently not in harmony with what the Supreme Court held in the Scammon cases. As already stated, however, we can not accept any so-called majority rule contrary to that announced by the Illinois Supreme Court, and likewise, we would not be justified in repudiating a holding of that court because of certain language appearing in decisions of Appellate Courts apparently to the contrary. We shall, therefore, not discuss the Appellate Court decisions relied upon by the plaintiff.

The court also found that the failure to give notice deprived defendant of the right and opportunity to associate with Central Mutual in defense and control of the Snow suit, and that the rights of defendant were prejudiced

thereby. Plaintiff argues there is no justification for this finding, as there was no proof that the results would have been different if the defendant had been permitted so to do. In view of the decisions in the Scammon cases, the finding of the court in this respect was perhaps immaterial, but even if so, we think it was justified. The right was provided by the terms of the contract and we are of the view that the deprivation of such right would constitute prejudice without any actual proof that the results of the litigation would have been different.

Plaintiff also relies upon a contention that the defendant, by its conduct, waived the giving of notice in compliance with the contract requirement. The court below expressly found that the facts relied upon by the plaintiff did not constitute waiver. We are convinced there was no error in this respect. In support of its position in this regard, plaintiff sought to prove that notice given to the defendant was oftentimes informal and did not conform to the provisions of the reinsurance contract. Five such instances are cited in plaintiff's brief, which we assume are the strongest in support of its position. Three of such instances, however, are covered by a non-waiver agreement which was executed by Central Mutual and the defendant dated August 7, 1935. It is evident from the record the defendant, at this time, had become aware that Central Mutual was not giving prompt notice of claims, and on that date defendant's representative visited the office of Central Mutual for the purpose of investigating its records. These three cases were discovered and listed in the so-called non-waiver agreement. In other words, as we understand, the defendant agreed to consider the matter of liability on these claims without prejudice to its rights under the insurance contract. It is difficult to perceive how this situation furnishes any support to plaintiff's claim of waiver.

In one instance relied upon, the accident happened July 7, 1935, and defendant was given notice September 3, 1935,

but prior to trial. In the other instance, the accident happened May 21, 1935, and was reported October 5, 1935. We do not think these isolated instances selected from a large number of claims covered by the contract can be regarded as sufficient to sustain the contention that defendant waived the terms of the contract concerning notice. Especially is this true in view of the fact that defendant had complained to Central Mutual concerning its delay in reporting accidents.

Plaintiff also stresses a telegram from the defendant to Central Mutual, found in the files of the latter, dated February 25, 1936, in the following language: "Sorry but our records do not confirm Snow-Hartliep ever reported; please give us complete information." It is plaintiff's theory that inasmuch as the telegram failed to deny liability, it constituted a waiver of notice. The exact occasion for this telegram is somewhat a matter of conjecture. It is evident from the record that Central Mutual made no reply thereto. Defendant's explanation of this telegram is to the effect that its representative, in the latter part of February, 1936, was called on the telephone by an official of Central Mutual and told there was a case coming up the following day and that the defendant should have someone there because it was a serious case. Defendant's representative inquired as to the title of the case. This information was conveyed to the defendant, which, it is pointed out, was probably the occasion for the telegram. It is of interest and perhaps of importance to note that a hearing in the garnishment proceedings against Central Mutual was to be heard on February 28, 1936. The only significance which can be reasonably attached to this telegram, in our opinion, is that the defendant had had no notice of the Snow accident and was requesting information. It has been held that an insurer must have knowledge of all the material facts before its conduct can constitute a waiver. Ferrero v. National Council of Knights & Ladies of Security, 309 Ill. 476, 481, 141 N.E. 130. From the telegram it

is apparent that the defendant had no knowledge of the facts of the case. Without knowledge of the date of the accident, its nature, the amount of the claim involved, or the history of the litigation which had been had, it certainly did not waive any of the contract provisions by the information thus sought.

Plaintiff also advances a theory that because the suit was instituted by him as Receiver, he has greater legal rights than the corporation would have had if the suit had been instituted by it. In other words, it is contended that some sort of an estoppel should be invoked in the instant situation, which admittedly could not have been done against the corporation. We do not believe this position is tenable. The Receiver was appointed January 11, 1937. Long prior thereto, as pointed out heretofore, the claim against the defendant was barred for failure to give notice of loss in accordance with the terms of the insurance contract. We know of no rule of law which will permit the maintenance of a suit by a Receiver which was barred at the time of the Receiver's appointment. Under such circumstances, so we think, a Receiver acquires no greater right than that had by the Corporation at the time of his appointment. People v. Depositors State Bank, 377 Ill. 602, 37 N.E.2d 326. Furthermore, this contention appears to have been an afterthought on the part of the plaintiff. In the amended complaint, plaintiff alleged performance of all conditions of the contract. In its answer defendant alleged, among other things, that Central Mutual failed to give notice as required by the reinsurance contract and that plaintiff's claim was thereby barred. The point now under discussion was not raised in the lower court, nor was it asserted in the alleged errors, designated in the court below, to be relied on upon appeal.

We therefore conclude that the record contains no reversible error and the judgment of the District Court is affirmed.